Supreme Court, U.S.
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NO. 94-2112

In the Supreme Court of the United States

October Term 1994

DEL ORO HILLS

Petitioner,

v.

CITY OF OCEANSIDE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction over a Fifth Amendment taking claim where the petitioner did not exhaust its state law inverse condemnation remedy.

2. Whether this Court has jurisdiction over any "as applied" taking claim where the petitioner did not apply to develop under the provisions of the ordinance.

3. Whether an ordinance that conflicts with state statutory law is, *per se*, a taking entitling a landowner to compensation for lost profits even though the ordinance did not affect petitioner's use of the land or the timing of development and even though the trial court held that the respondent proved, as a matter of fact, that the ordinance is necessary for the local health, safety or welfare.

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STATEMENT OF JURISDICTION

The Court lacks subject matter jurisdiction over any Fifth Amendment "taking" claim, facial or "as applied", because the petitioner, Del Oro Hills ("Del Oro"), did not exhaust its inverse condemnation remedy under the California Constitution. *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 194-196 (1985). The Court also lacks subject matter jurisdiction over any "as applied" taking claim because Del Oro did not apply for, and was not denied, development approvals under the provisions of the ordinance. *Williamson County*, 473 U.S. 172, 199-200.

STATEMENT OF THE FACTS AND THE CASE

The factual and procedural background of this case is well-summarized in the California Court of Appeal's opinion, Appendix A to the petition, pages A-3 through A-14.

Del Oro's statement of the case is extremely misleading. Some of the relevant facts and procedural matters that the petition fails to mention are listed below.

1. Del Oro never pursued its state inverse condemnation cause of action. A-12, fn. 5.

2. Del Oro never applied for or was denied permission to develop its property. A-23.

3. Del Oro's master subdivision map specifically stated "the approval of the map does not grant any development rights". A-9.

4. The ordinance did not, in fact, interfere with Del Oro's plans for development. Del Oro sold all of its villages and the developers of the villages all received development permits within Del Oro's own time frame. A-10 through A-11.

5. The California Court of Appeal in *Building Industry Association of San Diego v. City of Oceanside* (27 Cal.App.4th 744, 33 Cal.Rptr.2d 137 (1994) (Petition, Appendix B) did not reverse the trial court's ruling that the ordinance substantially advances a proper governmental interest. After a lengthy evidentiary trial, the Court held that the ordinance is justified under California Evidence Code Section 669.5 which reverses the normal

presumption of validity and places a heavy burden of proof on the local government.

6. The record of this case contains substantial evidence that the ordinance, in fact, substantially advances legitimate governmental interests.

7. The record of this case shows that Del Oro's principals actually secured millions of dollars in profits from the sale of the villages.

SUMMARY OF ARGUMENT

Del Oro contends that the Fifth Amendment to the United States Constitution automatically entitles a landowner to damages whenever a local regulation is held to be invalid because it conflicts with state statutory law. The Fifth Amendment is not a remedy for every perceived governmental error. The Constitution does not prohibit takings; it *authorizes* governments to take property upon payment of "just compensation". In the context of a regulatory taking, no compensation is due unless the property is deprived of substantially all reasonable, beneficial or productive use. *First English Evangelical Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Council,* 505 U.S. ___, 112 S.Ct. 2886 (1992). "Just compensation" for a regulatory taking does not include compensation for lost profits. *Andrus v. Allard,* 444 U.S. 51 (1979).

Certiorari should not be granted in this case because:

1. Del Oro's Fifth Amendment takings claim is not ripe because Del Oro did not exhaust its state judicial remedies. *Williamson County,* 473 U.S. 172, 194-196.

2. Del Oro cannot state an "as applied" takings claim because Del Oro did not apply or develop under the provisions of the ordinance. *Williamson County*, 473 U.S. 172, 199-200.

3. The California courts correctly found that, in fact, the ordinance satisfies both prongs of the *Agins* test. The evidence in the trial record shows that:

a. The ordinance substantially advances police power purposes which have been held constitutional by state and federal courts. *E.g., Agins v. Tiburon,* 447 U.S. 255 (1980); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9 (1994); *Construction Industry Assn. v. City of Petaluma,* 522 F.2d 897, 905-908, *cert. denied* (1976) 424 U.S. 934 (9th Cir. 1975); *DeVita v. Napa County,* 9 Cal.4th 763, 38 Cal.Rptr.2d 699 (1995).

b. Del Oro's property was not deprived of substantially all reasonable use. *First English,* 482 U.S. 304, 322; *Lucas,* 112 S.Ct. 2886, 2899.

4. Inconsistencies with state statutory law do not give rise to a takings claim under the Fifth Amendment to the United States Constitution. *Moore v. City of Costa Mesa,* 886 F.2d 260, 264 (9th Cir. 1989).

ARGUMENT

I.

THIS COURT LACKS JURISDICTION BECAUSE DEL ORO DID NOT EXHAUST ITS STATE JUDICIAL REMEDIES

On September 28, 1990, Del Oro filed a first amendment to its complaint alleging a seventeenth cause of action for damages under 42 U.S.C. Section 1983 based on the Fifth Amendment to the United States Constitution[1]. Prior to trial, Del Oro abandoned its fifth cause of action for inverse condemnation under the California Constitution. A-12, fn. 15.

Since this Court's decision in *Williamson County*, it has been clear that private landowners may not pursue a "takings" claim under the Fifth Amendment unless they have exhausted available procedures for recovering "just compensation" in state courts. The rule has been applied without question in every circuit. *Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993); *Gilbert v. City of Cambridge*, 932 F.2d 51, 63-65 (1st Cir. 1991); *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 502-503 (9th Cir. 1990); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574-1575 (11th Cir. 1989); *Estate of Himelstein v. City*

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[1] This claim was barred by the one year statute of limitations when filed. *Azul Pacifico, Inc. v. City of Los Angeles*, 873 F.2d 704, 705 (9th Cir. 1992).

of Fort Wayne, 898 F.2d 573, 575-576 (7th Cir. 1990); *G.M. Engineers & Associates, Inc. v. West Bloomfield Township*, 922 F.2d 328, 331 (6th Cir. 1990); *Austin v. City and County of Honolulu*, 840 F.2d 678, 680-681 (9th Cir. 1988).

Since this Court's decision in *First English,* 482 U.S. 304, California courts have provided a constitutionally adequate damages remedy. *Schnuck v. City of Santa Monica*, 935 F.2d 171, 173 (9th Cir. 1991); *Sinaloa Lake Owners Assn. v. Simi Valley*, 882 F.2d 1398, 1403 (9th Cir. 1989); see *Healing v. California Coastal Commission,* 22 Cal.App.4th 1158, 1169, 27 Cal.Rptr.2d 758 (1994). Most recently the California Supreme Court in *Hensler v. City of Glendale*, 8 Cal.4th 1, 13, 32 Cal.Rptr.2d 244, 251-252 (1994), stated the rules:

> "The Fifth Amendment to the United States Constitution conditions the state's right to take private property for public use on the payment of 'just compensation.' It leaves to the state, however, the procedures by which compensation may be sought. 'If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking.' (*Williamson Planning Comm'n v. Hamilton Bank, supra,* 473 U.S. 172, 194-195, 105 S.Ct. 3108, 3121, 87 L.Ed.2d

126; see also *Preseault v. ICC* (1990) 494 U.S. 1, 11, 110 S.Ct. 914, 921, 108 L.Ed.2d 1.)

> "California provides such a process by making available an action for inverse condemnation if, after exhausting administrative remedies to free the property from the limits placed on development and obtaining a judicial determination that just compensation is due, any restrictions for which compensation must otherwise be paid are not lifted. In that action the court determines whether the restriction on development 'goes too far' and will be constitutionally impermissible unless just compensation is paid for the taking brought about by the restriction."

Because Del Oro failed to pursue its state law inverse condemnation remedy, this Court is without jurisdiction to entertain a takings claim.

II.

AN "AS APPLIED" TAKINGS CLAIM IS NOT RIPE BECAUSE DEL ORO DID NOT APPLY TO DEVELOP UNDER THE PROVISIONS OF THE ORDINANCE

The California courts correctly held that an "as applied" challenge is not ripe for judicial review. *Williamson County*, 473 U.S. 172, 199-200. Del Oro infor-

mally asked to be totally exempted from the ordinance based on a vested rights theory, but it did not apply to develop under either the exemptions to the ordinance or through implementing procedures of the ordinance. It is undisputed that the purchasers of Del Oro's property actually received permission to develop all of the 1,200 dwelling units contemplated by Del Oro's project within the time frame envisioned by Del Oro. The Court of Appeal correctly held that:

> ". . . Under the settled rules for property owners, it is evident that Del Oro has failed to perfect an 'as applied' challenge because it did not apply for permits or allocations to develop the property or seek a variance of some type, other than complete exemption. We are reluctant to create a new category of wholesaler of land or intermediary who is exempt from the requirement of exhaustion of administrative and judicial remedies, based solely on Del Oro's timing argument that it lost profits due to the growth control restrictions which allegedly impeded a timely sale of its property. . . ." A-23 through A-24.

Because Del Oro did not obtain a final decision regarding the application of the ordinance to its property, it is foreclosed from making an "as applied" takings claim.

III.

THE CALIFORNIA COURTS CORRECTLY HELD THAT THE ORDINANCE, ON ITS FACE, SATISFIES BOTH PRONGS OF THE *AGINS* TEST

A. Conflicts With State Statutory Law Do Not Establish That The Ordinance, On Its Face, Fails To Substantially Advance Any Legitimate Governmental Interest.

The California Court of Appeal correctly analyzed and rejected Del Oro's claim that it is entitled to at least nominal damages because the Court held the ordinance invalid as conflicting with state statutes and the City's general plan. The California Court explained:

> "Although we found in our BIA opinion that Prop. A could not stand because it was in conflict with the City's general plan and statutory provisions, we do not find that conclusion mandates a finding here that Prop. A also violates constitutional rights so as to constitute a per se taking of private property. Instead, we conclude that Del Oro has failed to show Prop. A promotes no legitimate state purpose and would thus be facially invalid under takings standards. . . ." A-2 through A-3.

> ". . . Del Oro claims it is entitled to at least nominal damages for a per se constitutional violation of its property rights. (*Memphis Community School Dist. v. Stachura* (1986) 477 U.S. 299, 308, fn. 11.) However, as we have suggested above, the statutory and other infirmities found in Prop. A do not convert it into an unconstitutional taking of property on the undisputed facts here. An invalid regulation is not necessarily an unconstitutional one. (*Moore v. City of Costa Mesa* (9th Cir. 1989) 886 F.2d 260. . . .)" A-28.

Inconsistencies with state statutory law do not rise to the level of an impermissible governmental purpose under the United States Constitution. Different standards are involved. *Moore*, 886 F.2d 260, 264 [". . . While the California courts determined that the conditional variance invaded Moore's property rights, this was not an 'invasion' of sufficient magnitude to have denied Moore the 'justice and fairness' guaranteed by the fifth and fourteenth amendments. . . ."]; see, also, *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988).

Federal courts have often held that a local regulation which violates state planning laws, is not unconstitutional so long as the regulation advances some constitutionally permissible purpose. *Moore*, 886 F.2d 260, 264 [invalid conditional variance not a taking]; *Bello*, 840 F.2d 1124, 1126 [unlawful denial of a permit not a

taking]; *Chesterfield Development Corp. v. City of Chesterfield,* 963 F.2d 1102, 1103-1106 (8th Cir. 1992) [enactment of otherwise reasonable general plan and zoning regulations in violation of state law not a basis for substantive due process claim]; *Harding v. County of Door,* 870 F.2d 430, 431-432 (7th Cir. 1989), *cert. denied,* 110 S.Ct. 154 [substantive due process not violated even where plaintiff had been prevented from building by local actions expressly found unlawful by state court]; *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988) ["A violation of state law is not a denial of due process of law."]; *Chiplin Enterprises, Inc. v. City of Lebanon,* 712 F.2d 1524, 1527 (1st Cir. 1983) [violation of state law not equivalent to violation of constitutional rights]. In *Petaluma,* 522 F.2d 897, 905-908, the federal court expressly rejected a challenge to growth management regulations similar to the ordinance in this case despite allegations that the regulations did not satisfy a "regional welfare" standard and express findings that the regulations had a strong exclusionary effect.

B. The Ordinance Substantially Advances Legitimate Governmental Interests.

The purposes set forth in the ordinance (Appendix 1) are on their face legitimate. The voters stated their intent in the ordinance:

> "It is the intent of the people of the City to establish control over the quality,

> distribution, and rate of growth of the City in the interest of: Preserving the character of the community; Protecting the open space of the City; Protecting the quality of life in the City; Ensuring the adequacy of City facilities; school facilities, recreation and park facilities and services; Ensuring a balance of housing types and values in the City which will accommodate a variety of families including families of moderate income and older families on limited and/or fixed incomes; Ensuring the balanced development of the City; Preventing further significant deterioration in the local air quality; Ensuring that the traffic demands do not exceed the capacity of streets; Ensuring the character of the City's semi-rural or rustic neighborhoods is preserved; Ensuring that the City does not grow in a pattern that places a severe strain on the local freeway system; Ensuring the adequacy of fire protection; and Ensuring adequate water and sanitary sewer systems."

In this case the trial court held, after a lengthy evidentiary trial where the City carried a heavy statutory

burden of proof[2], that the ordinance was, in fact, necessary for the public health, safety or welfare because "the demonstrated unhealthy growth rate existing in Oceanside as of 1987 created 'real and substantial' problems which the City could reasonably anticipate to occur in the near future". Statement of Decision, August 6, 1991. The evidence admitted at trial shows that, when the citizens enacted the ordinance, the City's population was increasing at a far more rapid rate than the region. Twenty-five thousand dwelling units had tentative map or specific plan approvals with no time limit on when they could be built. This could translate into 60,000 new residents in a City with a population of 100,000. The pace of new development was causing severe deficiencies in public facilities and services resulting in traffic congestion, overcrowded schools, libraries and parks, police and fire service concerns, overflowing sewers, inadequate drainage facilities, and less than a 36 hour supply of water. The trial court found that the ordinance was necessary for the local health, safety and welfare because existing regula-

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[2] Evidence Code Section 669.5 provides, in part:

"(a) [Such an ordinance] is presumed to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of the city, county, or city and county.

"(b) With respect to any action which challenges the validity of an ordinance specified in subdivision (a) the city, county, or city and county enacting the ordinance shall bear the burden of proof that the ordinance is necessary for the protection of the public health, safety, or welfare of the population of the city, county, or city and county."

tions did not give the City the power to regulate the timing of development. The purposes of the ordinance are proper under state and federal law and supported by substantial evidence in the record.

This Court and lower federal courts have often held that growth management purposes like those set forth in the ordinance are constitutional. See, *e.g.*, *Agins*, 447 U.S. 255, 261 [ordinance "discouraging premature and unnecessary conversion of open-space lands to urban uses"]; *Belle Terre*, 416 U.S. 1, 9; *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1236 (9th Cir. 1994) [preserving "small town" character, providing range of housing types and limiting development consistent with local resources]; *Petaluma*, 522 F.2d 897, 905-908 [upholding growth control regulations].

California courts have repeatedly held that such purposes serve valid local interests. In *Long Beach Equities v. County of Ventura (City of Simi Valley)*, 231 Cal.App.3d 1016, 1030, 282 Cal.Rptr. 877 (1991), *cert. den.* (1992), for example, the court summarized:

> "City enacted its [growth management] ordinance 'to protect the unique, hill-surrounded environment; enhance the quality of life; promote public health, safety or welfare and the general well-being of the community. . . .' By limiting the rate, distribution, quality and type of residential development on an annual basis, with periodic reviews of the ongoing situa-

> tion, City seeks 'to improve local air quality, reduce traffic demands . . . and ensure that future demands for such essential services as water, sewers and the like are met. . . .'
>
> "Courts have long recognized the legitimacy of such ordinances, because such laws are designed to protect the public weal. [Citing cases.]. . ."

Recently, in *DeVita*, 9 Cal.4th 763, 791, the California Supreme Court observed:

> "General plan amendments such as Napa County's Measure J are one response to what some localities view as unwelcome development pressures. (See, Glickfeld, Local Initiatives in the 90s, *supra*, 1 Land Use Forum at pp. 99-100.) The purpose of the initiative, as articulated in an amicus brief by the cities of Napa County (the Cities) in support of the County, is to protect agricultural land from the encroachment of suburban development. The phenomenon of sprawling development has been identified as a serious land use problem in this state. (See, e.g., Bank of America et al., Beyond Sprawl: New Patterns of Growth to Fit the New California (1995) [report examining the increasing economic and environmental costs of suburban

> sprawl and calling for fundamental changes in state growth patterns]; *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840, 850 [171 Cal.Rptr. 619]. . . ."

The California Court of Appeal in this case correctly recognized that conflicts with state statutory law do not make the ordinance unconstitutional

C. Compensation Is Not Required Where The Property Is Not Deprived Of Substantially All Reasonable Use And Retained Substantial Value.

Del Oro contends that every regulation that is technically invalid under state statutory law automatically amounts to a violation of the Fifth Amendment to the United States Constitution even where the landowner was not deprived of "just compensation". Del Oro does not contend that it suffered an illegal exaction (*cf. Dolan v. City of Tigard*,___ U.S. ___, 114 S.Ct. 2309; *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)) or a physical occupation of its property (*cf. Kirby Forest Industries v. United States*, 467 U.S. 1, 5 (1984)) or was deprived of all beneficial use of its land (*cf. First English*, 482 U.S. 304; *Lucas*, 505 U.S. ___, 112 S.Ct. 2886) or any distinct property right (*cf. Hodel v. Irving*, 481 U.S. 704 (1987) [right to bequeath property].)

> The Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise

> of that power. [Citations.] This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights, *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. 304, 314-315.

The California Court of Appeal correctly recognized that:

> ". . . Prop. A does not affect the nature of the use of Del Oro's property, as Del Oro admits that its property remains zoned and specifically planned as it was in 1986, before Prop. A was introduced. . . .
>
> "* * *
>
> ". . . Del Oro does not dispute that it sold all its property within its own time frame and it or its buyers received permits to develop all the property for residential use within five years of the 1987 adoption of Prop. A. Del Oro's damages claims are thus based upon its lost profits, which it blames on Prop. A's interference with its projected timing of its land development deals. . . ." A-25 through A-26.

Del Oro posits the dangerous theory that it is entitled to damages for fluctuations in the real estate market, which Del Oro attributes to the campaign for the

ordinance, not the application of the ordinance to Del Oro's land. Del Oro claims that, when the ordinance was proposed by the voters, from that point on, it became practically impossible to market its property and claims damages for lost profits. The record shows that, in fact, all Del Oro's property was sold within Del Oro's two year time frame and the principals in the Del Oro enterprise actually profited handsomely.

It is well established that "just compensation" does not include compensation for lost profit expectations *(cf. Andrus*, 444 U.S. 51, 66) and that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership'". *First English*, 482 U.S. 304, 320. No compensation is due until a taking actually occurs. *Ibid.*; see, also, *Danforth v. United States*, 308 U.S. 271, 278 (1939).

This Court has ruled that the abrogation of the right to sell property is not a taking. *Andrus*, 444 U.S. 51, 64. Here, Del Oro was not prevented from selling; Del Oro only claims it might have profited more from its sales without the "psychological" impacts of the ordinance on the market. The Fifth Amendment does not provide a remedy for every perceived business loss. Anticipated profits are entirely too speculative to form a basis for damages for inverse condemnation.

> "[The] [p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. . . ." *MacLeod v. Santa Clara*

County, supra, 749 F.2d at p. 548, quoting *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

In the context of a regulatory taking, claims of lost profits as a basis for damages have been soundly rejected by federal courts. *Ibid.;* see, also, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and *Hodel*, 481 U.S. 704. Even in direct condemnation cases the "developer's approach" to valuation is too speculative to be admissible as an element of value. In *Contra Costa Water District v. Bar-C Prop.*, 5 Cal.App.4th 655, 658, 7 Cal.Rptr.2d 91 (1992), the court explained:

> ". . . Stated another way 'evidence of value in terms of the money which the land would bring for a specific purpose or as a result of a projected specific plan of development is not admissible as an element in determining such market value.' [Citations omitted.]
>
> "The rationale for this rule is that the expenses of completing the subdivision, improving the land, laying out streets, holding it and paying out taxes and interest until the lots are sold are far too uncertain and conjectural to allow finished subdivided lot prices to be used as a basis for computing value. (See 4 Nichols, Eminent Domain (3d ed. 1992 supp.), § 12B.14.) As one court put it '[s]uch evidence opens wide the door to unlimited vagaries and

> speculations concerning problematical prices which might under possible contingencies be paid for the land. . . .'"

Del Oro's speculation that it might have sold its property for more money if the ordinance had not qualified for the ballot is not an element of just compensation.

The California Court's opinion is consistent with the Ninth Circuit's analysis in a recent flooding case where the plaintiffs contended that they were entitled to compensation before their property was damaged. In rejecting the claim, the federal court of appeals observed "'[t]he Constitution . . . does not require a state to provide . . . pretaking compensation'." *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994). In other words, just compensation is not due until a protected property interest has been taken. Del Oro was not deprived of any protected property interest by the Ordinance. The Constitution does not protect Del Oro's desire to sell its property for a greater profit.

CONCLUSION

This case raises no special and important reason for Supreme Court review. The petition for certiorari should be denied.

Respectfully submitted,

KATHERINE E. (WATSON) STONE
MYERS, WIDDERS, GIBSON & LONG

Counsel of Record for Respondent

APPENDIX

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Counsel of Record for Respondent

APPENDIX

APPENDIX 1

PROPOSITION A
ORDINANCE NO. _____

AN ORDINANCE SUBMITTED BY INITIATIVE PETITION TO THE VOTERS AT THE APRIL 21, 1987, SPECIAL ELECTION RELATING TO RESIDENTIAL DEVELOPMENT CONTROL

The people of the City of Oceanside do ordain and hereby add Chapter 32A to the Oceanside Municipal Code as follows:

Chapter 32A. RESIDENTIAL DEVELOPMENT CONTROL

Sections:

32A.1	Findings
32A.2	Applicability of the Development Control System
32A.3	Establishment of Residential Development Evaluation Board
32A.4	Establishment of Annual Residential Development Allotments
32A.5	Development Allotment Application
32A.6	Development Allotment Evaluation
32A.7	Development Allotment Awards
32A.8	Additional Regulations
32A.9	Judicial Review
32A.10	Legal Challenges

32A.11 Modifications
32A.12 Severability
32A.13 Effective Date

Section 32A.1 Findings.

The people of the City of Oceanside, hereinafter called "City", hereby find and declare as follows:

(a) The City has adopted a General Plan and City Ordinances relating to the regulation of residential development.

(b) The City is experiencing a period of intense residential development which is adversely affecting the health, safety, and welfare of the citizens of Oceanside. This intense development has affected the capacity of the streets and local freeway system to satisfactorily meet traffic demands; the capacity of appropriate schools to absorb children without expensive bussing; the character of some of the neighborhoods of the community which have been identified as semi-rural, rustic, or agricultural in nature; the quality of life prevalent in the City and its sphere of influence; and the cost to households of some utilities and municipal services.

(c) It is the intent of the people of the City to achieve a steady, rather than a fluctuating, overly rapid, rate of residential growth each year in order that the services provided by City, School, Park, utility and/or

service agencies operating in the City can be properly and effectively staged in a manner which will not overextend existing facilities, and in order that deficient services may be brought up to required and necessary standards while minimizing, by means of long-range planning, the avoidable costs of shortsighted facility expansion. In order to accomplish this, fees collected for drainage, schools, streets, utilities, parks and recreation facilities shall be utilized in a timely manner to insure that new residents who pay impact fees will benefit directly from those facilities that are built within a reasonable time after they move in.

(d) It is the intent of the people of the City to establish control over the quality, distribution, and rate of growth of the City in the interest of: Preserving the character of the community; Protecting the open space of the City; Protecting the quality of life in the City; Ensuring the adequacy of City facilities, school facilities, recreation and park facilities and services; Ensuring a balance of housing types and values in the City which will accommodate a variety of families including families of moderate income and older families on limited and/or fixed incomes; Ensuring the balanced development of the City; Preventing

further significant deterioration in the local air quality; Ensuring that the traffic demands do not exceed the capacity of streets; Ensuring the character of the City's semi-rural or rustic neighborhoods is preserved; Ensuring that the City does not grow in a pattern that places a severe strain on the local freeway system; Ensuring the adequacy of fire protection; and Ensuring adequate water and sanitary sewer systems.

(e) It is the purpose of this ordinance to augment the policies of the City as recorded in the General Plan and City ordinances relating to the regulation of residential development; and

(f) In order to accomplish this purpose, the City must be able to control the rate, distribution, quality and economic level of proposed development on a year to year basis. To this end the following Residential Development Control System, hereinafter called "RDCS", for the City shall be in effect from and after its effective date until December 31, 1999.

Section 32A.2 Applicability of the Development Control System.

The provisions of the RDCS shall apply from the effective date to all residential development, including mobile homes, in the City of Oceanside with the exception of the following:

(a) Projects of not more than four residential dwellings, limited to only one such project per developer per calendar year.

(b) Fourplexes or less numbered multiple dwellings on a single existing lot.

(c) Single family residential units on a single existing lot.

(d) Rehabilitation or remodeling of an existing dwelling, or conversion of apartments to condominiums, so long as no additional dwelling units are created.

(e) Units within the legally designated redevelopment project area.

(f) Those specific Units which are formally dedicated for occupancy by low- income persons or senior citizens pursuant to the provisions of applicable federal, state, or local laws or programs provided these types of units are spread equitably throughout the city and not concentrated in one neighborhood. For the purposes of this section, a project is funded or subsidized pursuant to applicable federal, state or local laws or programs if it receives a loan, grant or continuing financial subsidy for the purpose of developing low-income or senior citizen housing units. This section does not exempt low-income or senior citizen projects built with density bonuses

or other development considerations under any program.

(g) Single family dwelling unit projects with lots an average of which are 10,000 square feet or better, which can achieve a minimum of 70% or better, of the maximum awardable points using the Residential Development Evaluation System are exempt.

Section 32A.3 Establishment of Residential Development Evaluation Board.

In order to administer the system set forth herein, and especially to make the valuations set forth in Section 32A.6 below, a Residential Development Evaluation Board (hereinafter called the Board) is hereby established, consisting of the duly appointed members of the Planning Commission of the City.

The procedures and bylaws of the Board shall be developed by the Board subject to the approval of the City Council of Oceanside (hereinafter called the City Council). The Planning Department of the City of Oceanside shall serve as the staff of the Board.

Section 32A.4 Establishment of Annual Residential Development Allotments.

The number of dwelling units hereinafter to be constructed each year in the City (except for dwelling units exempted in accordance with the provisions of section 32A.2 shall be as follows:

(a) Calendar year 1987: A maximum of 1000 units; and

(b) Calendar year 1988 and all years thereafter through December 31, 1999: a maximum of 800 dwelling units.

The annual allotment may be modified by the City Council to an amount not greater than 10% more or less for any given year, provided that the annual allotment for the next succeeding year shall be set higher or lower, as the case may be, in order to redress any excess or deficit. The annual allotment shall be continuously applicable to the City's jurisdictional boundaries and shall not be modified by reason of annexation or additional territory. This allotment shall conform to the Public Facilities Management Element Projected Growth as established by Resolution Number 79-27 of the City Council of Oceanside.

Section 32A.5 Development Allotment Application.

No building permit of nonexempted projects may be issued unless a development allotment for such project has been granted. At the time prior to obtaining a building permit, the developer of proposed projects not exempted from application for a development allotment pursuant to the provisions of Section 32A.2 shall apply for a development allotment as set forth herein.

Section 32A.6 Development Allocation Evaluation.

The Board shall consider all applications properly submitted and shall make recommendations to the City Council based on the criteria set forth below:

(a) Availability of Public Facilities and Services. The Board shall examine each application for its relations to, or impact upon, local public facilities and services, and shall rate each development by assignment of from zero to ten points (zero indicating "very poor" and ten indicating "excellent") on each of the following attributes:

(i) The capacity of the water system to provide for the needs of the proposed development without system expansions or extensions beyond those normally installed by the developer.

(ii) The capacity of the sanitary sewers to dispose of the wastes of the proposed development without system expansions or extensions beyond those normally installed by the developer.

(iii) The capacity of the drainage facilities to adequately dispose of the surface runoff of the proposed development without system extension beyond those normally installed by the developer.

(iv) The ability of the fire department to provide fire protection according to the established response standards of the City without the necessity of establishing a new station or requiring addition of major equipment or housing facilities to an existing station.

(v) The capacity of the appropriate school to absorb the children expected to inhabit a proposed development without necessitating or adding to double sessions or other unusual scheduling or classroom overcrowding or adding to expensive school bussing.

(vi) The capacity of major street linkage to provide for the needs of the proposed development without substantially altering existing traffic patterns or overloading the existing street system, and the availability of other public facilities (such as parks, playgrounds, etc.) to meet the additional demands for vital public services without extension of services beyond those provided by the developer.

(vii) The capacity of Highway 76 within the city limits to provide for the needs of the proposed development.

(b) The Board shall examine each application which has not been withdrawn by the applicant for failure to meet subsection (a), and shall rate each development by the assignment of from zero to ten points (zero indicating "very poor", ten indicating "excellent") on each of the following attributes:

(i) Site and architectural design quality which may be indicated by the harmony of the proposed buildings in terms of size, height, color and location with existing neighboring development.

(ii) The amount and character of open space and slope landscaping.

(iii) Site and architectural design quality which may be indicated by the arrangement of the site for efficiency of circulation, on and off site traffic safety, privacy, etc.

(iv) The provision of public and/or private usable open space.

(v) Contributions to and extensions of existing system of foot or bicycle

paths, equestrian trails and facilities and/or greenbelts.

(vi) The provision of needed public facilities such as critical linkages in the major street system, school rooms, functional parks, or other vital public facilities.

(vii) Site and architectural design quality which may be indicated by the amount and character of modification of the topography, including quantity of grading, extent of natural slopes cut and/or filled and impact on ridgelines.

(viii) Absence of deleterious impact on trees and archaeological sites.

(ix) The provision of energy generation and conservation features.

(x) The provision of energy generation and conservation features, such as additional insulation, house siting and design, solar techniques and other innovative techniques.

(xi) Absence of deleterious impact on the physical and/or aesthetical environment.

(c) After having studied each application in accordance with subsections (a) and (b), in regard to each of the criteria, and having

assigned evaluation points on a scale of 0 to 10 in accordance with their findings, the Board shall prepare two lists, one documenting points awarded from subsection (a) and the other from subsection (b), arranging the greatest total number of evaluation points to that receiving the lowest number. In addition to listing the number of actual points awarded in each subcategory of both parts, each part will be totaled and the total shall then be expressed as a percentage of the maximum number of points awardable. The maximum number of points awardable shall not include those elements of the criteria found to not be applicable.

Section 32A.7 Development Allotment Awards.

(a) The City Council shall consider at a public hearing, the recommendations and rankings of the proposed developments on each of the above described two lists, along with any action taken by the Board concerning appealed decisions, and shall compile one list ranking each of the proposed developments, and shall award from that list development allotments.

(b) Minimum point requirements. The City Council shall eliminate from consideration any development which has not been assigned a minimum of 51 percentage points

under Section 32A.6, subparagraph (a) herein, or a minimum of 70 percentage points under Section 32A.6, subparagraph (b). If in any given year the highest ranking development does not at least meet both of the minimum point requirements, the City Council shall make no Development Allotment for that year. The number of units will then be added, as the only allowed exception to the 10 percent rule in Section 32A.4 to the allotment for the ensuing year.

(c) Should a developer fail to initiate construction within twenty four months after award of the Development Allotment, the City Council, after a hearing must rescind all or part of the Development Allotment.

(d) The City Council shall develop such policies and ordinances as necessary to implement the Ordinance within 30 days of passage.

Section 32A.8 Additional Regulations.

Should the arrangement of projects as provided in Section 32A.7, subparagraph (a), produce the situation in which two projects have equal evaluation scores, but only one project can be permitted within the quota, the City Council may offer those applications a pro rata share of the number of units available within the quota, or may dispose of such a tie in any other manner deemed equitable by the City.

Section 32A.9 Judicial Review.

Any legal action to challenge a decision or denial of the Board, or any other government body performing a function under this ordinance, must be filed in a court of competent jurisdiction within thirty days immediately following the action challenged.

Section 32A.10 Legal Challenges.

Any legal action to challenge any provision of this ordinance or to challenge the intent of this ordinance, must be vigorously defended by the City.

Section 32A.11 Modification.

The City Council may, after a public hearing, by a unanimous vote, change any part of this RDCS by amendment, providing the amendment is consistent with the intent of this ordinance.

Section 32A.12 Severability.

If any provision of this ordinance, or the application thereof, to any person or circumstance is held invalid by a court of competent jurisdiction, the validity of the remainder of this ordinance and the application of such provisions to other persons or circumstances shall not be affected thereby.

Section 32A.13 Effective Date.

This RDCS shall be considered as adopted upon the date that the vote is certified by the City Clerk, and shall go into effect immediately thereafter.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on July 25, 1995, I served the within *Opposition To Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original and 40 Copies)

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Attorneys for Amicus Curiae
Pacific Legal Foundation and
People for Affordable Housing

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 25, 1995, Los Angeles, California.

Betty J. Malloy
(*Original Signed*)